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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Nancy Claflin,

No. CV-19-04718-PHX-JJT

Plaintiff,

ORDER

V.

Robert L. Wilkie,

Defendant.

At issue is Defendant's Motion for Summary Judgment (Doc. 51, DMSJ), supported by Defendant's Statement of Facts (Doc. 52, DSOF), to which Plaintiff filed a Response (Doc. 60, Resp.) with an Additional Statement of Facts (Doc. 58, PSOF), and Defendant filed a Reply (Doc. 62, Reply). For the reasons that follow, the Court grants Defendant's Motion.

I. BACKGROUND

Plaintiff, Nancy Claflin, is the former Associate Director of Patient Care Services and Nurse Executive of the Phoenix Veterans Affairs Medical Center (“Phoenix VA”). Plaintiff alleges that Defendant, Dennis McDonough¹, the Secretary of Department of Veterans Affairs, forced Plaintiff to retire. Because of her forced retirement, Plaintiff asserts three causes of action: (1) disparate treatment based on gender violation of Title

¹ To update the case's caption from the former Secretary of Veterans Affairs, Secretary Wilkie, to the current Secretary of Veterans Affairs, Secretary McDonough, Defendant must file a Notice of Substitution of Party with the Clerk of the Court.

1 VII; (2) hostile work environment; and (3) disparate treatment based on age in violation of
 2 the Age Discrimination Employment Act (“ADEA”), 29 U.S.C. §§ 621, et seq.

3 Five individuals lead the Phoenix VA: the Medical Center Director, the Associate
 4 Director, the Chief of Staff, the Associate Director of Patient Care/Executive Nurse, and
 5 the Assistant Director (collectively the individuals are referred to as the “PENTAD”).
 6 (DMSJ at 2.) In April 2014, whistleblowers came forward alleging the Phoenix VA used
 7 secret waitlists to conceal prolonged waits for appointments, and that as many as 40
 8 veterans had died while waiting for primary care appointments. (DMSJ at 2.) At the time,
 9 the PENTAD was comprised of Sharon Helman (Medical Center Director), Lance
 10 Robinson (Associate Director), Darren Deering (Chief of Staff), Plaintiff (Associate
 11 Director of Patient Care/Nurse Executive), and John Scherpf (Assistant Director). On
 12 May 1, 2014, in the aftermath of the whistleblower allegations, Ms. Helman and
 13 Mr. Robinson were placed on administrative leave. (DMSJ at 2.) On May 8, 2014, the
 14 Secretary of Veterans Affairs, Eric Shinseki, ordered audits of all VA health-care facilities
 15 in the United States and on May 15, 2014, the first of multiple Congressional hearings was
 16 held. (DMSJ at 2.) Eventually both Robert Petzel, the Under Secretary for Health in the
 17 Department of Veterans Affairs, and Secretary Shinseki retired and resigned, respectively.
 18 (DMSJ at 2.) By the middle of June 2014, the VA’s Office of Inspector General, the Federal
 19 Bureau of Investigations, and the White House had all begun investigations. (DMSJ at 2.)

20 Steve Young became the Acting Medical Center Director (“AMCD”) after
 21 Ms. Helman was placed on administrative leave. While Mr. Young was the AMCD, the
 22 Joint Commission, a hospital accrediting organization, conducted an unannounced survey
 23 of the Phoenix VA. (DMSJ at 2.) Shortly thereafter, Mr. Glenn Costie became the AMCD,
 24 replacing Mr. Young. (DMSJ at 2.) Mr. Costie was verbally informed of the Joint
 25 Commission’s findings while the surveyor was on sight and the subsequent written report
 26 detailed deficiencies in the nursing department. (DSOF at 40.)

27 In July 2014, the VA Office of Nursing Services (“ONS”) sent Dr. Beth Taylor to
 28 assist Plaintiff. (DMSJ at 3.) Dr. Taylor notified Plaintiff that Mr. Costie, in light of the

1 surveyor's concerns, had requested an additional review of nursing services which would
 2 be conducted in early August. (DMSJ at 3.) That review, completed by Ms. Jones Monnett,
 3 the Nurse Executive from the Dayton VA, identified problems with Plaintiff's "tight
 4 control on recruitment and hiring processes." (DSOF at 39.) Ultimately, Mr. Costie
 5 concluded Plaintiff was "part of the problem." (Reply at 3.)

6 At some point Dr. Taylor discussed the risks Plaintiff faced if she stayed in her
 7 position. Mr. Costie had similar conversations with Plaintiff. (DMSJ at 3.) As an
 8 alternative, Dr. Taylor discussed the possibility of Plaintiff moving to a virtual position
 9 with ONS or retiring. (DMSJ at 3.) Eventually, in August of 2014, Plaintiff resigned from
 10 the Phoenix VA. On July 16, 2019, she filed the present lawsuit in the District of Arizona.
 11 Defendant now moves to dismiss the case on Summary Judgment.

12 **II. LEGAL STANDARD**

13 Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is
 14 appropriate when: (1) the movant shows that there is no genuine dispute as to any material
 15 fact; and (2) after viewing the evidence most favorably to the non-moving party, the
 16 movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*,
 17 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th
 18 Cir. 1987). Under this standard, "[o]nly disputes over facts that might affect the outcome
 19 of the suit under governing [substantive] law will properly preclude the entry of summary
 20 judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue"
 21 of material fact arises only "if the evidence is such that a reasonable jury could return a
 22 verdict for the nonmoving party." *Id.*

23 In considering a motion for summary judgment, the court must regard as true the
 24 non-moving party's evidence, if it is supported by affidavits or other evidentiary material.
 25 *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party
 26 may not merely rest on its pleadings; it must produce some significant probative evidence
 27 tending to contradict the moving party's allegations, thereby creating a material question
 28 of fact. *Anderson*, 477 U.S. at 256-57 (holding that the plaintiff must present affirmative

1 evidence in order to defeat a properly supported motion for summary judgment); *First Nat'l
2 Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

3 “A summary judgment motion cannot be defeated by relying solely on conclusory
4 allegations unsupported by factual data.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
5 1989). “Summary judgment must be entered ‘against a party who fails to make a showing
6 sufficient to establish the existence of an element essential to that party’s case, and on
7 which that party will bear the burden of proof at trial.’” *United States v. Carter*, 906 F.2d
8 1375, 1376 (9th Cir. 1990) (quoting *Celotex*, 477 U.S. at 322).

9 **III. ANALYSIS**

10 **A. Plaintiff’s Disparate Treatment Claim Based on Gender**

11 In order to show disparate treatment under Title VII, Plaintiff must first establish a
12 *prima facie* case of discrimination as the United States Supreme Court set forth in
13 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To establish a disparate
14 treatment claim a plaintiff must show (1) the plaintiff belongs to a protected class; (2) she
15 was performing according to her employer's legitimate expectations; (3) she suffered an
16 adverse employment action; and (4) similarly situated employees were treated more
17 favorably or other circumstances surrounding the adverse employment action give rise to
18 an inference of discrimination. See *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1156
19 (9th Cir. 2010); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998) (citing
20 *McDonnell Douglas*, 411 U.S. at 802).

21 “If the plaintiff establishes a *prima facie* case, the burden of production—but not
22 persuasion—then shifts to the employer to articulate some legitimate, nondiscriminatory
23 reason for the challenged action If the employer does so, the plaintiff must show that
24 the articulated reason is pretextual ‘either directly by persuading the court that a
25 discriminatory reason more likely motivated the employer or indirectly by showing that
26 the employer’s proffered explanation is unworthy of credence.’” *Id.* (internal citations and
27 quotations omitted). A plaintiff may rely on circumstantial evidence to demonstrate pretext,
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1 but such evidence must be both specific and substantial. *Id.* At the last step, if the plaintiff
 2 can show pretext, the only remaining issue is whether discrimination occurred or not. *Id.*

3 Plaintiff alleges she was performing her job satisfactorily and experienced disparate
 4 treatment because she was forced to retire while two other PENTAD members, who were
 5 male and younger, were not. (Resp at 6.) To support her claim Plaintiff cites her “forty
 6 years of service with the Phoenix VA and three consecutive years of “excellent” or
 7 “[o]utstanding” performance reviews as Nurse Executive. (Resp. at 10.) Defendant argues
 8 Plaintiff’s claim fails because she was not performing her job satisfactorily. (DMSJ at 9.)
 9 Even if she was, Defendant argues that Plaintiff fails to produce specific and substantial
 10 evidence of disparate treatment. (DMSJ at 9.)

11 The Court agrees that Plaintiff fails to create a genuine issue of material fact as to
 12 whether she can show a *prima facie* case of discrimination. Undisputed evidence shows
 13 Plaintiff’s job performance was unsatisfactory. Following its inspection, the Joint
 14 Commission report identified deficiencies that fell under Plaintiff’s responsibility. Plaintiff
 15 states the Joint Commission report does “not explicitly cite [Ms.] Claflin or her
 16 performance as a matter for concern.” (Resp. at 9.) However, under the Chapter titled
 17 “Nursing”, the hospital received a score of “insufficient compliance” with the report
 18 stating, among other things, that “[t]he Nurse Executive h[ad] not ensured that there [wa]s
 19 appropriate staffing of CNAs [(Certified Nursing Assistants)] for this unit.” (DSOF Ex. 14
 20 DEF-VA-001297-98.) Additionally, Ms. Monnett, the Nurse Executive who was
 21 completing an additional review of Nursing Services, also expressed concerns. (Reply
 22 at 4.) Further, Dr. Taylor had independently identified concerns within the nursing
 23 department and communicated them to Mr. Costie. (DMSJ at 8.) Plaintiff, to support her
 24 argument that she was performing satisfactorily, relies on performance evaluations held
 25 prior to July 2014. Prior reviews do not establish that Plaintiff was meeting her employer’s
 26 legitimate expectations in July 2014. The evidence thus shows that at the time Plaintiff
 27 experienced an adverse employment action, she was not performing her job satisfactorily.
 28 See *Nganje v. CVS RX Servs., Inc.*, 2015 WL 4173269, at *9 (D. Ariz. July 10, 2015)

1 (granting summary judgment dismissing disparate treatment claim because “[g]iven the
 2 discipline plaintiff received in 2010–2012 and the ‘needs improvement’ performance
 3 evaluation she received in 2012, no reasonable jury could conclude that she was performing
 4 her job satisfactorily”). Because Plaintiff cannot show she was performing her job
 5 satisfactorily, Summary Judgment in favor of Defendant is appropriate as to Plaintiff’s
 6 disparate treatment claim based on Title VII.

7 **B. Plaintiff’s ADEA Claim**

8 The ADEA makes it unlawful for an employer “to discharge any individual or
 9 otherwise discriminate against any individual with respect to his compensation, terms,
 10 conditions, or privileges of employment, because of such individual’s age.” 29 U.S.C.
 11 § 623(a)(1). This protection applies to individuals who are at least 40 years old. 29 U.S.C.
 12 § 631(a). To state a claim of age discrimination, a plaintiff must allege sufficient facts to
 13 show she (1) belongs to a protected class; (2) was performing her job satisfactorily; (3) was
 14 rejected despite her qualifications; and (4) the employer filled the position with an
 15 employee not of plaintiff’s class or continued to consider other applicants whose
 16 qualifications were comparable to plaintiff’s after rejecting plaintiff. *Dominguez-Curry v.*
 17 *Nev. Transp. Dep’t*, 424 F.3d 1027, 1037 (9th Cir. 2005) (citing *McDonnell Douglas*, 411
 18 U.S. at 802).

19 Similar to the analysis above, Plaintiff fails to create a genuine issue of material fact
 20 as to whether she can show a *prima facie* case of an ADEA violation because she cannot
 21 establish she was performing her job satisfactorily. Accordingly, Summary Judgment in
 22 favor of Defendant is appropriate on Plaintiff’s ADEA claim.

23 **C. Plaintiff’s Hostile Work Environment Claim**

24 To establish a *prima facie* case for a hostile work environment, Plaintiff must raise
 25 a triable issue of fact as to whether (1) Defendant subjected her to verbal or physical
 26 conduct of a harassing nature; (2) the conduct was unwelcome; and (3) the conduct was
 27 sufficiently severe or pervasive to alter the conditions of her employment and create an
 28 abusive working environment. *Clark v. City of Tucson*, 2018 WL 1942771, at *13 (D. Ariz.

1 Apr. 25, 2018). Whether the conduct was sufficiently severe or pervasive is determined by
 2 the facts of the case in totality of the circumstances. “We must consider all the
 3 circumstances, including ‘the frequency of the discriminatory conduct; its severity;
 4 whether it is physically threatening or humiliating, or a mere offensive utterance; and
 5 whether it unreasonably interferes with an employee’s work performance.’” *Davis v. Team*
 6 *Elec. Co.*, 520 F.3d 1080, 1095 (9th Cir. 2008) (quoting *Harris v. Forklift Sys., Inc.*, 510
 7 U.S. 17, 23 (1993)). “Simply causing an employee offense based on an isolated comment
 8 is not sufficient to create actionable harassment under Title VII.” *McGinest v. GTE Serv. Corp.*,
 9 360 F.3d 1103, 1113 (9th Cir. 2004). Rather, a plaintiff must show that the
 10 workplace was “permeated with discriminatory intimidation, ridicule, and insult” to
 11 demonstrate that it was sufficiently hostile or abusive to establish an actionable harassment
 12 claim. *Harris*, 510 U.S. at 21.

13 Plaintiff claims she was subjected to a hostile work environment “via [PENTAD]
 14 leadership’s threats to [Ms.] Claflin’s career and, subsequently, her retirement benefits and
 15 livelihood.” (Resp. at 14.) Plaintiff contends, “these threats were in-part motivated by [Ms.]
 16 Claflin’s protected status as a female over the age of forty-years-old.” (Resp. at 14.) To
 17 support her claim Plaintiff states Dr. Taylor told Plaintiff, despite any evidence of subpar
 18 performance, that Defendant was sending individuals to investigate and remove
 19 Ms. Claflin. (Resp. at 15.) Further, she alleges, Mr. Costie told her allowing her to stay in
 20 her position was not an option. (Resp. at 8.) Additionally, Plaintiff states she cried most
 21 days upon leaving work, was experiencing weight loss, and was in a constant state of fear
 22 due to her treatment at work. (Resp. at 15.)

23 Contrary to Plaintiff’s assertion, there was ample evidence of subpar performance
 24 at the Phoenix VA. The whistleblower’s allegations led to multiple government
 25 investigations and naturally members of PENTAD would be scrutinized. Further, being
 26 informed that an employer has concerns about one’s performance does not create a hostile
 27 work environment. The Court finds a reasonable person would not find Plaintiff’s situation
 28 was a hostile or an abusive environment. *See e.g. Vasquez v. County of Los Angeles*, 349

1 F.3d 634 (9th Cir. 2003) (no racially hostile work environment claim where the supervisor
2 made only two derogatory comments about the plaintiff in a six-month period); *Manatt v.*
3 *Bank of Am.*, 339 F.3d 792, 798 (9th Cir. 2003) (conduct was not severe or pervasive even
4 though plaintiff alleged her coworkers often made racially insensitive comments such as
5 “China man,” made derogatory comments regarding China and communism, made fun of
6 the plaintiff’s accent, and “pulled their eyes back with their fingers in an attempt to imitate
7 or mock the appearance of Asians”); *Kortan v. California Youth Authority*, 217 F.3d 1104
8 (9th Cir. 2000) (plaintiff failed to sustain a hostile work environment claim based on: (1) a
9 supervisor calling female employees “castrating bitches,” “Madonnas,” or “Reginas” on
10 multiple occasions in the plaintiff’s presence; (2) the plaintiff’s supervisor calling the
11 plaintiff “Medea;” and (3) sending her postcards at home); *but see Fuller v. Idaho Dep’t of*
12 *Corr.*, 865 F.3d 1154, 1163 (9th Cir. 2017) (employer’s decision to support employee who
13 allegedly raped plaintiff went beyond simple offensive comments and was sufficiently
14 hostile to survive summary judgment). Accordingly, Summary Judgment in favor of
15 Defendant is appropriate as to Plaintiff’s claims based on hostile work environment.

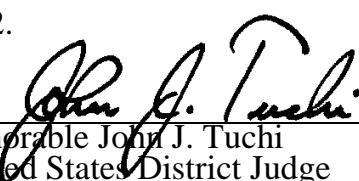
16 **IV. CONCLUSION**

17 The Court grants Summary Judgment to Defendant on Plaintiff’s disparate
18 treatment, ADEA, and hostile work environment claims.

19 **IT IS THEREFORE ORDERED** granting Defendant’s Motion for Summary
20 Judgment (Doc. 51).

21 **IT IS FURTHER ORDERED** directing the Clerk of the Court to enter judgment
22 accordingly and close this case.

23 Dated this 14th day of March, 2022.

24 
25 Honorable John J. Tuchi
United States District Judge

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